

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
WESTERN DIVISION**

ALLEN BINSTOCK,)	
Regional Director of)	
Region 8 of the National)	
Labor Relations Board,)	
for and on behalf of the)	
NATIONAL LABOR RELATIONS BOARD)	
)	
Applicant)	
)	
V.)	Civil No.
)	
FREEDOM EMPLOYMENT SERVICES, LLC)	
)	
Respondent)	

**MEMORANDUM IN SUPPORT OF APPLICATION
FOR ORDER ENFORCING SUBPOENA DUCES TECUM**

This case is before the Court on application by Regional Director of Region 8 Allen Binstock (Applicant) for and on behalf of the National Labor Relations Board (the Board) for an order enforcing a subpoena duces tecum issued by the Board to Freedom Employment Services, LLC (Respondent). Jurisdiction of this Court is invoked under Section 11(2), 29 U.S.C. § 161(2), of the National Labor Relations Act, as amended, 29 U.S.C. § 151 et seq., (the Act).

I. BACKGROUND

At the time of events at issue in this proceeding, the International Longshoremen's Association, Local 1982, AFL-CIO, (the Charging Party or Union), was the exclusive bargaining representative under Section 9(a), 29 U.S.C. § 159(a) of the Act¹ for a unit of employees

¹ Section 9(a) [29 U.S.C. § 159(a)] defines exclusive representation as follows:

Representatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment: *Provided*, That any individual employee or a group

employed by Midwest Terminals of Toledo International, Inc. (Midwest Terminals) at its Facility One, which is located at 3518 Saint Lawrence Drive, Toledo, Ohio.² The Union had represented employees at Facility One for over forty years and had been recognized by Midwest Terminals when it acquired the facility in 2004.

The employees represented by the ILA are responsible for the loading, unloading, and movement of cargo and materials on the west side of St. Lawrence Drive, which runs through Facility One, and for the handling of petroleum (sponge) coke throughout Facility One.³ These employees perform the stevedoring work during the shipping period which on the Great Lakes generally runs from April through November.

The application for this subpoena enforcement arises out of the investigation of unfair labor practice charges currently pending before the Board's Region 8 (Cleveland) office raising violations of Section 8(a)(5) and (1) of the Act.⁴ The unfair labor practice charges in Case

of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective-bargaining contract or agreement then in effect: *Provided further*, That the bargaining representative has been given opportunity to be present at such adjustment.

² On January 4, 2018, the Union filed Case 08-CA-212483 in Region 8 of the National Labor Relations Board. The charge alleges that Midwest Terminals unlawfully withdrew recognition from the Union. These allegations are under investigation and the evidence sought regarding the use of non-bargaining unit employees to perform bargaining unit work as well as the allegations that bargaining unit employees were hired at non-contractual wages and benefits may impact the finding in this case.

³ The west side of St. Lawrence Drive runs alongside of the Maumee River and is also referred to as the "wet" side of the dock. Midwest Terminals employs additional employees who are represented for purposes of collective bargaining by the International Brotherhood of Teamsters, Local 20. These employees perform work primarily on the east or "dry" side of the river dock. With minimal exceptions, Local 1982 has jurisdiction over work performed on the wet side while Teamsters Local 20 has jurisdiction over work performed on the dry side. *Teamsters Local 20 and Midwest Terminals of Toledo International, Inc. and ILA, Local 1982*, 359 NLRB No. 107 (April 30, 2013) (involving jurisdictional work dispute). The Board's decision in 359 NLRB No. 107 was invalidated under the Supreme Court's ruling in *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014). However, the parties have not since argued in subsequent proceedings that the decision is not binding on the parties to the dispute. *Midwest Terminals of Toledo International*, 365 NLRB No. 158, fn. 1 (Dec. 15, 2017).

⁴ Section 8(a) [29 U.S.C. § 158(a)]: It shall be an unfair labor practice for an employer –

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7 [section 157 of this title];

....

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a) [section 159(a) of this title].

Numbers 08-CA-195939 and 08-CA-208319 allege in relevant part that Midwest Terminals has assigned non-bargaining unit employees to perform bargaining unit work on a regular and continuing basis. Case Number 08-CA-204544 alleges Midwest Terminals directly dealt with bargaining unit employees by hiring them at reduced wages and benefits, and by bypassing bargaining unit employees eligible to perform this bargaining unit work. Case Number 08-CA-211702 alleges that Midwest Terminals engaged in bad faith bargaining during negotiations for a successor contract by a number of alleged actions, including making the above unilateral changes. Case Number 08-CA-212483 alleges that Midwest unlawfully withdrew recognition from the Union. Together, the charges involve actions taken from December 1, 2016 through January 3, 2018.

During the course of the investigation, evidence was presented that Respondent was performing work at Midwest Terminals' Facility One, including work related to the movement of aluminum. Evidence was also presented that Respondent was employing individuals who were current or former employees of Midwest Terminals. Thus, due to its business operations at Facility One, Respondent has essential information regarding whether non-bargaining unit employees were being used to load and move aluminum on the west side of the dock, as well as whether bargaining unit employees were being paid non-contractual wages and benefits to perform this work. The loading and movement of aluminum on the west side of the dock has been found to be bargaining unit work in prior Board decisions. *Teamsters Local 20, (Midwest*

Section 7 [29 U.S.C. § 157] gives employees the right to engage in the following concerted activities:

Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8(a)(3) [section 158(a)(3) of this title].

Terminals of Toledo), 359 NLRB No. 107 (April 30, 2013) and *Midwest Terminals of Toledo International*, 365 NLRB No. 158 (Dec. 15, 2017).

II. THE SUBPOENA AT ISSUE

In order to properly investigate the unfair labor practice charge allegations, a representative of the Applicant made a written request for, and received a subpoena duce tecum from the Board. Consistent with the requirements of Section 11(1) of the Act, 29 U.S.C. § 161(1), and Section 102.31(a) of the Board's Rules and Regulations, 29 C.F.R. §102.31(a) (March 6, 2017), a representative of the Applicant issued subpoena duces tecum B-1-12RAABP to Respondent on September 19, 2018 (Applicant Exhibit F).

The subpoena duces tecum directed Respondent's Custodian of Records to appear at 10:00 a.m. on October 3, 2018, or at any adjourned or rescheduled date, at the offices of the National Labor Relations Board at 1240 East Ninth Street, Suite 1695, Cleveland, Ohio, and to produce the following records:

1. Any and all contracts Freedom Employment Services has entered into for the performance of work for Midwest Terminals and/or for the supply of labor to Midwest Terminals.
2. Any and all contracts Freedom Employment Services has entered into with any entity for the performance of work at 3518 Saint Lawrence Drive, Toledo, Ohio 43605 and/or the supply of labor to any entity performing work at that location.
3. The complete personnel files for any Freedom Employment Services employees contracted to perform work for Midwest Terminals or otherwise performing work at 3518 Saint Lawrence Drive, Toledo, Ohio 43605 from December 1, 2016 to present.

4. Payroll records from December 1, 2016 to present for any and all employees contracted to perform work for Midwest Terminals or otherwise performing work at 3518 Saint Lawrence Drive, Toledo, Ohio.
5. Any and all documents detailing and/or showing in any way the nature of the work performed from December 1, 2016 to present by any Freedom Employment Services employees contracted to perform work for Midwest Terminals or otherwise performing work at 3518 Saint Lawrence Drive, Toledo, Ohio.
6. Any and all documents detailing the pay rate and benefits provided from December 1, 2016 to present to any Freedom Employment Services employees contracted to perform work for Midwest Terminals or otherwise performing work at 3518 Saint Lawrence Drive, Toledo, Ohio.
7. For the period from December 1, 2016 to present, any and all documents reflecting the job title and job duties of any Freedom Employment Services employee at the times when that employee was performing work at 3518 Saint Lawrence Drive, Toledo, Ohio or otherwise on behalf of Midwest Terminals.
8. Any and all handbooks, rules or policies applicable to Freedom Employment Services employees contracted to perform work for Midwest Terminals or otherwise performing work at 3518 Saint Lawrence Drive, Toledo, Ohio, and the dates those documents were in effect.
9. Any and all documents reflecting payments received from Midwest Terminals to Freedom Employment Services for services rendered by Freedom Employment Services from December 1, 2016 to present.

10. Any and all documents reflecting the owners, officers, managers, supervisors, and members of Freedom Employment Services from December 1, 2016 to present.

11. The Articles of Organization and Operating Agreement for Freedom Employment Services.

On October 1, 2018, the Applicant received a letter from Respondent requesting a two week extension to respond to the Region's September 19, 2018 correspondence. (Applicant Exhibit I) By letter dated On October 2, 2018, a representative of the Applicant granted the request. (Applicant Exhibit J) On October 11, 2018, the Applicant received a Notice of Appearance from Respondent's counsel. On October 23, 2018, a representative of the Applicant and Respondent's counsel spoke by phone regarding securing Respondent's cooperation with the subpoena and potentially reducing the amount of documentation Respondent was required to provide. On November 5, 2018, a representative of the Applicant emailed Respondent's counsel a letter requesting that Respondent provide the subpoenaed documents by November 14, 2018. The letter further explained that if the deadline was not met, an application for an Order enforcing the subpoena would be filed. (Applicant Exhibit K) Respondent did not respond to this correspondence.

II. THE BOARD'S GENERAL AUTHORITY TO ISSUE SUBPOENAS AND THE FEDERAL DISTRICT COURT'S GENERAL POWER TO ENFORCE

To aid the Board in the investigation and prosecution of unfair labor practice charges filed pursuant to Sections 8 and 10 of the Act, 29 U.S.C. §§ 158 and 160, the provisions of Section 11(1) of the Act, 29 U.S.C. § 161(1) vest in the Board the broad authority to issue and serve subpoenas requiring the attendance and testimony of witnesses and/or the production of evidence relating to any matter under investigation or in question in the administrative

proceedings. "Such attendance of witnesses and the production of such evidence may be required...at any designated place of hearing." 29 U.S.C. § 161(1).

Under Section 11(2) of the Act, 29 U.S.C. § 161(2), subpoena enforcement proceedings are commenced by the filing of an application by the Board.⁵ Section 11(2) further provides upon such application by the Board, that any United States District Court shall have jurisdiction to issue an order requiring a person to appear before the Board, or its agent, to give testimony or produce evidence if the court is located where the Board's inquiry is being carried on or if the person guilty of contumacy or refusal to obey is found, resides or transacts business within that court's jurisdiction.⁶

⁵ The courts have held that enforcement proceedings need not be commenced by service of a summons and a complaint which are normally required to commence a civil suit pursuant to Rule 4 of the Federal Rules of Civil Procedure. *Goodyear Tire & Rubber Co. v. NLRB*, 122 F.2d 450, 450 (6th Cir. 1941); *Cudahy Packing Co. v. NLRB*, 117 F.2d 692, 694 (10th Cir. 1941). Additionally, a subpoena enforcement case is summary in nature and a district court must treat the Board's application as a dispositive matter. *See NLRB v. Frazier*, 966 F.2d 812, 817-18 (3rd Cir. 1992). The Federal Rules of Civil Procedure specifically authorize the courts to allow a less formal application of the rules in keeping with the summary nature of the application for enforcement. *See Fed. R. Civ. P. 81(a)(5)*.

⁶ Section 11 [29 U.S.C. § 161] For the purpose of all hearings and investigations, which, in the opinion of the Board, are necessary and proper for the exercise of the powers vested in it by Section 9 and Section 10 [sections 159 and 160 of this title]

- (1) The Board, or its duly authorized agents or agencies, shall at all reasonable times have access to for the purpose of examination, and the right to copy any evidence of any person being investigated or proceeded against that relates to any matter under investigation or in question. The Board or any member thereof, shall upon application of any party to such proceedings, forthwith issue to such party subpoenas requiring the attendance and testimony of witnesses or the production of any evidence in such proceeding or investigation requested in such application. Within five days after the service of a subpoena on any person requiring the production of any evidence in his possession or under his control, such person may petition the Board to revoke, and the Board shall revoke, such subpoena if in its opinion the evidence whose production is required does not relate to any matter under investigation, or any matter in question in such proceedings, or if in its opinion such subpoena does not describe with sufficient particularity the evidence whose production is required. Any member of the Board, or any agent or agency designated by the Board for such purposes, may administer oaths and affirmations, examine witnesses, and receive evidence. Such attendance of witnesses and the production of such evidence may be required from any place in the United States or any Territory or possession thereof, at any designated place of hearing.
- (2) In case of contumacy or refusal to obey a subpoena issued to any person, any United States District Court or the United States Courts of any Territory or possession, within the jurisdiction of which the inquiry is carried on or within the jurisdiction of which said person guilty of contumacy or refusal to obey is found or resides or transacts business, upon application by the Board shall have jurisdiction to issue to such person an order requiring such person to appear before the Board, its member, agent, or agency, there to produce evidence if so ordered, or there to give testimony touching the matter under investigation or in question; and any failure to obey such order of the court may be punished by said court as a contempt thereof.

The subpoena duces tecum was served on Respondent by addressing and sending the subpoena by certified mail and by regular mail with delivery confirmation to Respondent's business at 2620 Centennial Road, Suite C, Toledo, Ohio 43617. The subpoena was issued to the Custodian of Records, but was sent in the care of Monier Deeb, who is Respondent's registered agent. Mr. Deeb's address for service is the same as Respondent's business address. Service documents for the subpoena sent by certified mail are included with this submission as Applicant Exhibit H. Service fully complies with 29 U.S.C. § 161(4) and Section 102.4 of the Board's Rules and Regulations, 29 C.F.R. § 102.4 (March 6, 2017). This Court may take judicial notice of the Board's Rules and Regulations under 44 U.S.C. § 1507.

Respondent has failed to fully comply with the subpoena. As Respondent conducts business within this district and as the Board's proceedings against Midwest Terminals are also being carried on within this district, this Court has jurisdiction to issue an appropriate order requiring Respondent to comply with the Board's subpoena duces tecum.

III. STANDARDS FOR ENFORCEMENT OF BOARD SUBPOENAS

The Board's subpoena power under Section 11(1) is exceedingly broad and subject to limited judicial review. 122 F.2d at 452-454 (involving Board subpoenas issued after complaint). "It is well settled that a subpoena issued by the Board pursuant to 29 U.S.C. § 161(1) should be enforced if 'the matter under investigation is within the jurisdiction of the Board and the evidence subpoenaed is related to that matter and is described with 'sufficient particularity'." *NLRB v. Martins Ferry Hosp. Ass'n.*, 649 F.2d 445, 448 (6th Cir. 1981) (*quoting NLRB v. ITT Telecommunications*, 415 F.2d 768, 769 (6th Cir. 1969)).

The courts have consistently held that where the Board seeks enforcement of a subpoena in a United States District Court pursuant to Section 11(2) of the Act, the scope of the judicial

inquiry is limited to whether a proceeding is pending before the Board of which the Court has jurisdiction and the evidence sought “relate[s] to or touch[es] the matter under investigation.” 117 F.2d at 694. In its defense, a respondent is similarly limited and prohibited from asserting its substantive defenses to the unfair labor practice allegations. *Id.* at 694; *See also* 122 F.2d at 452-53; *NLRB v. Frederick Cowan and Co.*, 522 F.2d 26, 28 (2nd Cir. 1975) (“The law is clear that a district judge passing upon a request for enforcement of a subpoena pursuant to Section 161(2) may undertake only an extremely limited inquiry.”).

The Sixth Circuit has long held that the production of evidence called for in a Board subpoena need only touch on or relate to the matter under investigation or in question to be relevant. 122 F.2d at 452-53. *See also, Endicott Johnson Corp. v. Perkins*, 317 U.S. 501, 509 (1943) (An agency’s subpoena must be enforced by a district court as long as it is not “plainly incompetent or irrelevant to any lawful purpose.”); 522 F.2d at 28.

Indeed, relevance is broadly construed to give the agency access to material that might only cast light on the allegations, including employer defenses and potential employer defenses. *See NLRB v. Rohlen*, 385 F. 2d 52, 55-58 (7th Cir. 1967); *NLRB v. Dutch Boy, Inc.*, 606 F.2d 929, 931032 (10th Cir. 1979). “ ‘[A] subpoena is proper even when it is designed to produce material concerning a defense that may never arise; the focus is on the relevancy to the investigation, not relevancy to the issues at the hearing.’ ” *NLRB v. North Bay Plumbing, Inc.*, 102 F.3d 1005, 1009 (9th Cir. 1996) (*quoting NLRB v. North American Van Lines, Inc.*, 611 F.Supp. 760, 765 (N.D. Ind. 1985)).

IV. THE SUBPOENA SHOULD BE ENFORCED

In the instant matter, Respondent is within this Court’s judicial district. Unfair labor practice charges were filed against Midwest Terminals in the Board’s Cleveland Region 8 office

and in the investigation of the charge allegations, the Board issued the subpoena duces tecum, which contains sufficiently particularized requests for relevant testimony and documentation within a clearly defined time frame. (Applicant Exhibit F)

The information sought by the subpoena directly relates to the unfair labor practice charges allegations. The unfair labor practice charges allege that Midwest Terminals has utilized non-bargaining unit employees to perform bargaining unit work on a regular and continuing basis. The Union alleges that over a specified time period since December 1, 2016, Midwest Terminals used non-bargaining unit employees, including supervisors and non-unit employees, to perform bargaining unit work. The Union also alleges the Midwest is utilizing non-unit employees to load aluminum for movement from the wet side to the dry side of the dock in violation of the Board's decisions in *Teamsters Local 20, (Midwest Terminals of Toledo)*, 359 NLRB No. 107 (April 30, 2013) and *Midwest Terminals of Toledo International*, 365 NLRB No. 158 (Dec. 15, 2017). Further, the Union alleges that Midwest has directly dealt with employees by hiring them at non-contractual wages and benefits. These allegations also impact whether Midwest Terminals' withdrawal of recognition was lawful.

The subpoena duces tecum seeks documentation from Respondent's Custodian of Records, as well as testimony regarding the subpoenaed documents. The information sought is directly related to Respondent's business relationship with Midwest Terminals and should reflect whether Midwest Terminals has subcontracted bargaining unit work to Respondent. The subpoena seeks the contracts that Respondent has to perform work at Midwest Terminals' 3518 Saint Lawrence Drive, Toledo, Ohio location. The subpoena also seeks any documents reflecting the nature of the work Respondent is performing at that location. This documentation should reflect whether Respondent is performing bargaining unit work. The subpoena also seeks

personnel files and payroll records for Respondent's employees performing work at the 3518 Saint Lawrence Drive, Toledo, Ohio location. This documentation will show if Respondent has employed Midwest Terminals' former or current employees.

In addition, the subpoena seeks documentation related to the pay, benefits and policies applicable to Respondent's employees working at Midwest Terminals' Facility One. This documentation should provide information regarding whether Respondent has hired former or current bargaining unit employees at pay and benefit levels different from those established by the past practice and most recent collective bargaining agreement between the Union and Midwest Terminals.

Finally, the subpoena seeks information regarding Respondent's leadership, its business organization, and its payments to Midwest Terminals. This documentation should reflect whether Midwest Terminals and Respondent have an arms-length business relationship and should shed light on Midwest Terminals' role in setting Respondents' employees terms and conditions of employment. The subpoena seeks information for the time period since December 1, 2016, which is the specific timeframe during which the Union alleges Midwest Terminals' unfair labor practices occurred.

The evidence sought by the subpoenas is probative to the Union's contentions that Midwest Terminals has violated Section 8(a)(1) and (5) of the Act by making unilateral changes in working conditions by assigning non-bargaining unit employees to perform unit work, as well as to the Union's allegations that Midwest Terminals has directly dealt with bargaining unit employees by paying them at reduced wages and benefits to perform bargaining unit work. The evidence is also necessary to determine if Midwest Terminals actions fall within the six month period before the filing of the charges, which is the statute of limitations applicable to Board

actions. 29 U.S.C. §160 (b). In the absence of receiving the relevant documentation, the Region is unable to determine if the allegations against Midwest Terminals have merit.

V. CONCLUSION

The Board's proceeding against Respondent is clearly within the scope of the Board's statutory jurisdiction. The Board has properly issued and served subpoena duces tecum B-1-12RAABP on Respondent in accordance with the Act, and the Board's Rules and Regulations. The Board's subpoena duces tecum identifies Respondent's Custodian of Records as the individual subpoenaed to testify regarding the subpoenaed documents and provides a detailed list of the documentation sought. Respondent is refusing to fully comply with the subpoena. Respondent's contumacy has frustrated and delayed the Board's ability to exercise its statutory function under the National Labor Relations Act. As the matter is properly within the jurisdiction of this Court, the Board respectfully requests that its Application for Order Enforcing Subpoena Duces Tecum be granted.

Dated: January 15, 2019

Respectfully submitted,

National Labor Relations Board
By: Peter Robb, General Counsel
Iva Choe, Regional Attorney For Region 8

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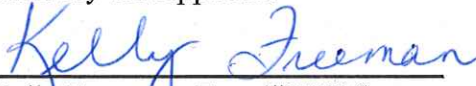
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Certificate of Service

I hereby certify that on January 15, 2019, I manually filed the foregoing Application for Order Enforcing Subpoena Duces Tecum, and exhibits attached thereto; a Memorandum in Support; and a proposed Order to Show Cause with the Clerk of the Court and served these documents by certified mail, and a courtesy copy without exhibits by email, to the following counsel:

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